

All Appropriate Inquiry Training Brief

Presented by
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- EPA All Appropriate Inquiry Regulation
- Changes from the 2000 version of the ASTM E1527

On January 11, 2002, President Bush signed into law the Small Business Liability Relief and Brownfields Revitalization Act (the Brownfields Amendments)

- Amended CERCLA to extend liability protections for contiguous property owners and bona fide prospective purchasers

TIME LINE OVERVIEW

1980s	1990s	2002	2005
CERCLA / SARA <i>Requiring AAI</i>	=====>	=====>	=====>
	ASTM E1527 <i>Developed to define “good commercial and customary practice” for conducting AAI</i>	=====>	=====>
		SBLRBRA <i>Cites ASTM E1527 as the Interim Standard for Conducting AAI</i>	=====>
			EPA AAI REGULATION <i>References ASTM E1527-05 for Conducting AAI</i>

Brownfields Amendments

- Cited the ASTM E1527 Standard Practice for Phase I ESAs as the interim standard for conducting all appropriate inquiries
- Required EPA to develop regulations establishing federal standards and practices for conducting all appropriate inquiries
- Included a list of criteria that EPA must address in the regulations

All Appropriate Inquiries

- **Criterion I:** The results of an inquiry by an environmental professional.
- **Criterion II:** Interviews . .
- **Criterion III:** Reviews of historical sources . . .
- **Criterion IV:** Searches for recorded environmental cleanup liens . . .
- **Criterion V:** Reviews of Federal, State, and local government records . . .
- **Criterion VI:** Visual inspections . . .

All Appropriate Inquiries

- **Criterion VII:** Specialized knowledge or experience on the part of the defendant.
- **Criterion VIII:** The relationship of the purchase price to the value of the property, if the property was not contaminated.
- **Criterion IX:** Commonly known or reasonably ascertainable information about the property.
- **Criterion X:** The degree of obviousness of the presence or likely presence of contamination at the property, and the ability to detect the contamination by appropriate investigation.

Comparisons of EPA AAI Regulation and ASTM E1527-05

Key Phrase Comparisons

EPA AAI Objective: Identify conditions indicative of releases and threatened releases of hazardous substances on, at, in, or to the subject property

ASTM E1527 Objective: Identify RECS - presence or likely presence of a hazardous substance or petroleum product . . . under conditions indicating a present, past or material threat of a future release . . . into structures, ground, or groundwater

EPA AAI – Gather information that is publicly available, obtainable within reasonable time and cost constraints, and can be practicably reviewed

ASTM E1527 - Reasonably ascertainable: publicly available, obtainable within reasonable time and cost constraints, and practically reviewable

EPA AAI - not intended to require the identification of quantities or amounts, either individually or in the aggregate, of hazardous substances that because of said quantities and amounts, generally would not pose a threat to human health or the environment

ASTM E1527 - *de minimis*: conditions that generally do not present a threat to human health or the environment and that generally would not be the subject of an enforcement action if brought to the attention of appropriate governmental agencies

EPA AAI - Review and evaluate the thoroughness and reliability of the information gathered, taking into account information gathered in the course of complying with the other standards and practices of the rule

ASTM E1527 – The EP shall make a reasonable effort to compensate for mistakes or insufficiencies in the information reviewed that are obvious in light of other information

Comparisons of EPA AAI Regulation and ASTM E1527-05

Addressing the 10 Criteria

Environmental Professional

- PE or PG and 3 yrs relevant experience
or
- Licensed or certified by federal government, a state, tribe, U.S. territory, or the Commonwealth of Puerto Rico to perform environmental inquiries and 3 yrs relevant experience
or
- Baccalaureate or higher degree in a discipline of engineering or science and 5 yrs relevant experience
or
- 10 yrs relevant experience

Environmental Professional

Relevant Experience:

- Participation in the performance of environmental site assessments
- May include environmental analyses, investigations, and remediation
- Understanding of surface and subsurface environmental conditions and the processes used to evaluate these conditions
- Professional judgment has been used to develop opinions regarding conditions indicative of releases or threatened releases

Role of the EP

AAI Section 312.21

- AAI must be conducted by an environmental professional, or conducted under the supervision or responsible charge of, an environmental professional.
- EPA pre-amble recommends the EP conduct the site visit

Role of the EP

ASTM E1527-05 Section 7.5.1

- ESA must be performed by the EP or conducted under the supervision or responsible charge of the EP
- Interviews and site visit performed by a person possessing sufficient training and experience necessary to conduct the site reconnaissance and interviews . . . having the ability to identify issues relevant to REC's
- EP must be involved in planning the site visit and interviews
- EP must perform review and interpretation

Interviews

AAI Section 312.23

ASTM E1527-05 Section 10

10.5.4 Past Owners, Operators, and Occupants— Interviews with past owners, operators, and occupants of the property who are likely to have material information regarding the potential for contamination at the property shall be conducted to the extent that they have been identified and that the information likely to be obtained is not duplicative of information already obtained from other sources.

Interviews

AAI Section 312.23

ASTM E1527-05 Section 10

10.5.5 Interview Requirements for Abandoned Properties - In the case of inquiries conducted at abandoned properties where there is evidence of potential unauthorized uses of the abandoned property or evidence of uncontrolled access to the abandoned property, interviews with one or more owners or occupants of neighboring or nearby properties shall be conducted.

Historical Sources

AAI Section 312.24

ASTM E1527-05 Section 8

8.3.2.3 Data Failure—The historical research is complete when either: (1) the objectives in 8.3.1 through 8.3.2.2 are achieved; or (2) data failure is encountered. Data failure occurs when all of the standard historical sources that are reasonably ascertainable and likely to be useful have been reviewed and yet the objectives have not been met.

Historical Sources

AAI Section 312.24

ASTM E1527-05 Section 8.3

8.3.2.3 cont'd . . . If *data failure* is encountered, the report shall document the failure and, if any of the *standard historical sources* were excluded, give the reasons for their exclusion. If the *data failure* represents a significant *data gap*, the report shall comment on the impact of the *data gap* on the ability of the EP to identify RECs.

Environmental Cleanup Liens

AAI Section 312.25

ASTM E1527-05 Section 6

6.2 Review Title and Judicial Records for Environmental Liens . . . Reasonably ascertainable recorded land title records and lien records that are filed under federal, tribal, state, or local law should be reviewed to identify environmental liens . . . Environmental liens . . . that are imposed by judicial authorities may be recorded or filed in judicial records, and, where applicable, such records should be reviewed.

Environmental Cleanup Liens

AAI Section 312.25

ASTM E1527-05 Section 6

6.2 cont'd . . . Unless added by a change in the scope of work to be performed by the EP, this practice does not impose on the EP the responsibility to undertake a review of recorded land title records and judicial records for environmental liens.

Govm't Records Review

AAI Section 312.26

ASTM E1527-05 Section 8.2

- CERCLA NFRAP to ½-mile
- Added IC Registries (property only)
- “State” database lists now reads “State and Tribal”
- Added State and Tribal Brownfields and VCP databases (½-mile)
- Due to variability of local records, these remain as “Additional Environmental Records”

Site Visit

AAI Section 312.27

ASTM E1527-05 Section 9

9.4.1.3 *Current Uses of Adjoining Properties*—To the extent that current uses of adjoining properties are visually and/or physically **observable** on the site visit . . .

Specialized Knowledge

AAI Section 312.28

ASTM E1527-05 Section 6.3

Appendix X3 – User Questionnaire

Purchase Price to Value

AAI Section 312.29

ASTM E1527-05 Section 6.5

6.5 . . . the user shall consider the
**relationship of the purchase price of the
property to the fair market value of the
property if the property was not affected
by hazardous substances or petroleum
products . . .**

Purchase Price to Value

AAI Section 312.29

ASTM E1527-05 Section 6.5

6.5 cont'd. . . Among the factors to consider will be the information that becomes known to the user pursuant to the Phase I Environmental Site Assessment. **This standard does not require that a real estate appraisal be obtained in order to ascertain fair market value of the property.**

Commonly Known/Reasonably Ascertainable

AAI Section 312.30

ASTM E1527-05 Section 6.6

6.6 - If the user is aware of any commonly known or reasonably ascertainable information within the local community about the property that is material to recognized environmental conditions in connection with the property, it is the user's responsibility to communicate such information to the environmental professional.

Degree of Obviousness

AAI Section 312.31

- AAI requires that prospective property owners and EP take into account information collected during the inquiries in considering the degree of obviousness
- AAI also requires the EP provide in the written report an opinion regarding additional appropriate investigation that may be necessary, if any.

Degree of Obviousness

AAI Section 312.31

ASTM E1527-05 Section 12.6

12.6.1 The environmental professional should provide an opinion regarding additional appropriate investigation, if any, to detect the presence of hazardous substances or petroleum products. This opinion should only be provided in the unusual circumstance when greater certainty is required regarding the identified recognized environmental condition . . .

Degree of Obviousness

AAI Section 312.31

ASTM E1527-05 Section 12.6

12.6.1 cont'd . . . A Phase I Environmental Site Assessment which includes such an opinion by the *environmental professional* does not render the assessment incomplete. This opinion is not intended to constitute a requirement that the *environmental professional* include any recommendations for *Phase II* or other assessment activities.

Other Issues

- Report Preparation
- Shelf Life
- Data Gaps
- Continuing Obligations
- Non-Scope Considerations
- Principles of ESAs

Report Conclusion

ASTM (12.8)

- “We have performed a *Phase I Environmental Site Assessment* in conformance with the scope and limitations of ASTM Practice E-1527 of [insert address or legal description], the *property*. Any exceptions to, or deletions from, this practice are described in Section [] of this report. This assessment has revealed no evidence of recognized environmental conditions in connection with the *property*.”
or
- “. . . This assessment has revealed no evidence of recognized environmental conditions in connection with the *property* except for the following: (list) “

EP Declaration

AAI Section 312.21

ASTM E1527-05 Section 12.13

- 12.13.1 “[I, We] declare that, to the best of [my, our] professional knowledge and belief, [I, we] meet the definition of *Environmental professional* as defined in §312.10 of 40 CFR 312” and
- 12.13.2 “[I, We] have the specific qualifications based on education, training, and experience to assess a *property* of the nature, history, and setting of the subject *property*. [I, We] have developed and performed the all appropriate inquiries in conformance with the standards and practices set forth in 40 CFR Part 312.”

Shelf Life

AAI Section 312.20

ASTM E1527-05 Section 4

- 4.6 . . . the following components must be conducted or updated within 180 days of the date of purchase:
- (i) interviews with owners, operators, and occupants;
 - (ii) searches for recorded environmental cleanup liens;
 - (iii) reviews of federal, tribal, state, and local government records;
 - (iv) visual inspections of the property and of adjoining properties; and
 - (v) the declaration by the environmental professional responsible for the assessment or update.

Shelf Life

AAI Section 312.20

ASTM E1527-05 Section 4

4.7.1 . . . [If reports are older than one year], the information shall not be used without current investigation of conditions likely to affect RECs. Additional tasks may be necessary to document conditions that may have changed materially since the prior *environmental site assessment* was conducted.

Data Gaps

AAI Section 312.20(f)

ASTM E1527-05 Section 12.7

AAI Section 312.20(f) - identify data gaps that affect the ability to identify conditions indicative of releases or threatened releases, identify sources consulted, and comment on the significance of the data gap with regard to the ability to identify conditions indicative of releases or threatened releases

Data Gaps

AAI Section 312.20(f)

ASTM E1527-05 Section 12.7

E1527-05 Section 12.7 – Data Gaps

- identify and comment on significant data gaps that affect the ability of the environmental professional to identify RECs.
- A data gap by itself is not inherently significant
- A data gap is only significant if other information and/or professional experience raises reasonable concerns involving the data gap.

Continuing Obligations NOT Addressed in AAI

To “achieve and maintain a landowner liability protection” the party seeking protection must:

- Comply with land use restrictions
- Not impede effectiveness or integrity of institutional controls
- Take “reasonable steps” with respect to the contamination
- Provide cooperation, assistance and access
- Comply with CERCLA information requests and subpoenas
- Provide legally required notices

Continuing Obligations NOT Addressed in AAI

Guidance regarding Continuing Obligations is presented in the EPA Common Elements Guidelines available from the EPA website:

<http://www.epa.gov/compliance/resources/policies/cleanup/superfund/common-elem-guide.pdf>

Non-scope Considerations

- Business environmental risk considerations
- Matters outside of the scope of CERCLA HS and PP
- Typical non-scope issues (X1.6)
 - Asbestos-containing materials
 - Radon
 - Lead-based paint
 - Lead in drinking water
 - Wetlands
 - Regulatory compliance
 - Other Issues

Principles of an ESA

- Due diligence principles (4.5)
 - Cannot eliminate all uncertainty (4.5.1)
 - Law of diminishing returns applies (4.5.2)
 - Appropriate inquiry varies (4.5.3)
 - Typical ILD AAI
 - AAI For Complex Brownfield Site

IMPLEMENTING AAI

- Final AAI rule published November 2005
- EPA References ASTM E1527-05 as being in full compliance with the AAI Regulation
- EPA Provided One Year Phase In Period when the following standards can be used:
 - ASTM E1527-97
 - ASTM E1527-00
 - ASTM E1527-05
 - EPA AAI Regulation
- After November 1, 2006, only the ASTM E1527-05 or the EPA AAI Regulation will be recognized

Where to Get More Information

Additional Information available at

- EPA website at epa.gov/brownfields
- ASTM Web Page at www.astm.org
 - E1527-05
 - E1527-05 Redline